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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. BENJAMIN OCHOA-RAMIREZ, Defendant.	Criminal Case No. 08-CR-1637-WQH DATE: September 8, 2008 TIME: 2:00 p.m. **UNITED STATES' NOTICE OF MOTIONS AND MOTIONS IN LIMINE TO:** **(A) ADMIT EXPERT TESTIMONY;** **(B) ADMIT DEMEANOR EVIDENCE;** **(C) LIMIT CHARACTER EVIDENCE;** **(D) PRECLUDE EVIDENCE OF DURESS AND NECESSITY;** **(E) PROHIBIT REFERENCE TO DEFENDANT'S HEALTH, FINANCES, EDUCATION, AND POTENTIAL PUNISHMENT;** **(F) EXCLUDE TESTIMONY OF DEFENDANT'S DAUGHTER;** **(G) PROHIBIT SELF-SERVING HEARSAY; AND** **(H) EXCLUDE ALL WITNESSES EXCEPT THE CASE AGENT;**

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt, United States Attorney, and David D. Leshner, Assistant United States Attorney, and hereby files its motions in limine. Said motions are based upon the files and records of this case together with the attached memorandum of points and authorities.

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MEMORANDUM OF POINTS AND AUTHORITIES

I

STATEMENT OF THE CASE

On May 27, 2008, defendant Benjamin Ochoa-Ramirez was arraigned on a two-count Indictment charging him with importation of marijuana and possession of marijuana with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), 952 and 960. Defendant entered a plea of not guilty.

II

STATEMENT OF FACTS

A. Defendant's Apprehension

On May 11, 2008, Defendant entered the United States from Mexico through the Calexico, CA West Port of Entry as the driver and sole occupant of a 1999 Ford Windstar. At primary inspection, CBP Officer W. Gerhart noticed that Defendant's hand was shaking when Defendant provided his border crosser card and that Defendant avoided eye contact during their encounter. In response to Officer Gerhart's questioning, Defendant asserted that the vehicle belonged to "a friend." Officer Gerhart observed that the glove compartment contained only the vehicle registration and was otherwise empty. Further, there was only one key on the ignition ring. Based on these observations, Officer Gerhart elected to refer Defendant's vehicle to secondary inspection.

At secondary inspection, CBP Officer L. Parker observed Defendant's nervous demeanor. Defendant informed Officer Parker that the vehicle belonged to a friend and that he was en route to a swap meet.

A narcotic and human detector dog alerted to the right side rear quarter panel of the vehicle. Subsequent inspection revealed 50 packages of marijuana concealed throughout the vehicle. The total weight of the marijuana was approximately 50.58 kilograms.

B. Defendant's Post-Arrest Statement

Defendant received Miranda warnings and agreed to make a statement. He denied knowledge of the marijuana in the vehicle. According to Defendant, he was to be paid 200 pesos to pick up someone at the Santo Thomas swap meet. Defendant further stated that he had crossed the vehicle into the United States on two prior occasions.

III

MOTIONS IN LIMINE

A. THE COURT SHOULD ADMIT EXPERT TESTIMONY BY UNITED STATES

1. Introduction

The United States will introduce expert testimony in its case-in-chief regarding (1) the substance concealed in Defendant's car was marijuana; (2) the value of the marijuana; and (3) the quantity of marijuana as consistent with an amount intended for distribution rather than for personal use. Specifically, a forensic chemist from the Drug Enforcement Administration will provide expert testimony to identify the substance as marijuana. A Special Agent with the United States Immigration and Customs Enforcement will testify as an expert in the value of marijuana in the Mexicali, Mexico and Imperial County, CA in May 2008 and distributable quantities of marijuana. The Court should admit such testimony as relevant and reliable.

2. Standard of Admissibility

If specialized knowledge will assist the trier-of-fact in understanding the evidence or determining a fact in issue, a qualified expert witness may provide opinion testimony on the issue in question. Fed. R. Evid. 702. The trial judge is the gatekeeper regarding the type and scope of expert testimony that should be admitted in any particular trial, and has "broad latitude" in determining the relevance and reliability of such testimony. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 142 (1999). Determining whether expert testimony would assist the trier-of-fact in understanding the facts in issue is within the sound discretion of the trial judge. United States v. Alonso, 48 F.3d 1536, 1539 (9th Cir. 1995); United States v. Lennick, 18 F.3d 814, 821 (9th Cir. 1994). The district court may consider the Daubert test or any other factors in addressing relevant reliability concerns regarding expert testimony. Kumho, 526 U.S. at 149-50 (noting that "there are many different kinds of experts, and many different kinds of expertise," including, "experts in drug terms, handwriting analysis, criminal modus operandi").

The expert's opinion may be based on hearsay or facts not in evidence when the facts or data relied upon are of the type reasonably relied upon by experts in the field. Fed. R. Evid. 703; see, e.g., United States v. Gil, 58 F.3d 1414, 1422 (9th Cir. 1995) (stating "[w]e have consistently held that government agents or similar persons may testify as to the general practices of criminals to establish the

defendants' modus operandi.") (internal quotations omitted); see also United States v. Hankey, 203 F.3d 1160, 1168-70 (9th Cir. 2000) (affirming district court's admission of gang expert testimony that gang members would be subject to violent retribution if they testified against another gang member).

An expert may provide opinion testimony even if the testimony embraces an ultimate issue to be decided by the trier-of-fact. Fed. R. Evid. 704; United States v. Plunk, 153 F.3d 1011, 1018 (9th Cir. 1998). An experienced narcotics agent may testify in the form of an opinion even if that opinion is based in part on information from other agents familiar with the issue. United States v. Golden, 532 F.2d 1244, 1248 (9th Cir. 1976). The proposed expert testimony "alerts [the jury] to the possibility that combinations of seemingly innocuous events may indicate criminal behavior." United States v. Johnson, 735 F.2d 1200, 1202 (9th Cir. 1984).

3. Testimony Identifying The Substance Seized As Marijuana

Absent a stipulation by Defendant, the United States will call Gary Goldberg, a forensic chemist with DEA, to testify as to the identity of the substance seized from Defendant's vehicle. The United States expects Mr. Goldberg to testify that laboratory examinations confirmed that the contraband was marijuana, a Schedule I Controlled Substance. This testimony bears directly on an element of the charged offense: that marijuana is a prohibited drug.

This testimony is permitted under Rule 702 of the Federal Rules of Evidence, which allows witnesses qualified as experts to testify as to scientific or technical knowledge that "will assist the trier of fact to understand the evidence." See United States v. Cruz, 127 F.3d 791, 801 (9th Cir. 1997) (DEA forensic chemist properly established as expert to identify nature of controlled substance); United States v. Burden, 497 F.2d 385, 387 (8th Cir. 1974) (forensic DEA chemist, whose educational background and experience were established, was properly allowed to testify as an expert on the various tests performed on a substance to confirm that it was marijuana).

4. Evidence Regarding Wholesale And Retail Value Of The Marijuana

The United States also intends to present expert testimony from U.S. Immigration and Customs Enforcement Special Agent Brandon Steifer regarding the wholesale value and street value of the marijuana seized in this case. Special Agent Steifer has continuous contact with state and federal intelligence programs, contact with narcotics agents at the state and federal levels, contact with

undercover agents who have worked closely with drug-traffickers, contact with cooperating defendants who have been or have worked with drug-smugglers, and contact with confidential informants who deal on an ongoing basis with narcotics-smuggling organizations and their tactics. He will testify as to the value of marijuana in Mexicali, Mexico and the Imperial County, CA area in May 2008 and that marijuana generally increases substantially in value when it crosses the United States-Mexico border.

From this testimony, the United States should be allowed to argue that the value of the marijuana circumstantially shows that Defendant knew the car he occupied contained marijuana, and that he possessed it with the intent to distribute. A reasonable inference from possession of this value of drugs is that the original owners would not entrust such a valuable commodity to a complete stranger who has no idea he is carrying the drugs. Also, the more valuable drugs are, the more reasonable it is to infer that they were meant to be further distributed to maximize sales. As knowledge and intent are essential elements of the offenses charged, the desired expert testimony is highly probative.

The Ninth Circuit has long allowed the introduction of such expert testimony, and has long permitted counsel to argue reasonable inferences therefrom. See, e.g., United States v. Ogbuehi, 18 F.3d 807 (9th Cir. 1994). In Ogbuehi, the defendant was charged with importing about 2.5 pounds of heroin. At trial, the United States introduced expert testimony of a DEA special agent as to the estimated street retail value of the heroin. The Ninth Circuit found that such testimony was proper, and that its probative value was not substantially outweighed by any prejudicial effect. Id. at 812 ("DEA agents can testify as to the street value of narcotics, . . . and counsel can argue reasonable inferences from it") (citation omitted); see also United States v. Savinovich, 845 F.2d 834, 838 (9th Cir. 1988) (evidence of $100,000 street value of cocaine was relevant to proving the defendant's intent to distribute); United States v. Ramirez-Rodriguez, 552 F.2d 883, 885 (9th Cir. 1977) (evidence of resale value of drug probative of intent to distribute); United States v. Golden, 532 F.2d 1244, 1247 (9th Cir.1976) ("The value of the heroin found in the bags was relevant to both appellants' knowledge of the presence of the heroin and intent to distribute") (citations omitted); Gaylor v. United States, 426 F.2d 233, 235 (9th Cir. 1970) (in prosecution for transporting cocaine, testimony concerning the selling price of cocaine was relevant to issue of knowledge, since it tended to refute "the possibility that a stranger could have placed such a valuable cargo in a vehicle in the hope that the vehicle could be followed and the cocaine later recovered

in the United States").

5. Evidence of Personal and Distributable Amounts of Marijuana

Finally, the United States intends to elicit expert testimony Special Agent Steifer to establish that the quantity of marijuana found in the vehicle occupied by Defendant is a distributable, rather than personal use amount. See United States v. Tavakkoly, 238 F.3d 1062, 1067 (9th Cir. 2001) (expert testimony that 1.35 kg of opium was inconsistent with possession for personal use was relevant to prove defendant's intent to distribute); United States v. Alatorre, 222 F.3d 1098, 1104-05 (9th Cir. 2000) (expert testimony properly admitted to establish that quantity of marijuana was distributable amount, rather than just personal use amount).

6. Evidence Regarding Modus Operandi of Drug Couriers

The United States will seek to introduce evidence concerning the modus operandi of drug-couriers if Defendant opens the door during opening statements, cross-examination or Defendant's case-in-chief. Such testimony would be limited to the following issues: (1) that drug traffickers typical do not entrust large amounts of drugs or money to unknowing couriers; and (2) that couriers, such as Defendant, do not typically participate in loading and unloading of the drugs. Such testimony is proper to help the jury understand the evidence in the case, to put that evidence in a relevant context and to ensure the jury does not decide the case in a vacuum. The evidence is relevant to the question whether Defendant knew of the drugs in the vehicle he drove into the United States. See United States v. Murillo, 225 F.3d 1169 (9th Cir. 2001).

Federal Rule of Evidence 702 allows an expert witness to testify if "specialized knowledge" will assist the trier of fact to understand the evidence or determine a fact in issue." Fed. R. Evid. 702. However, even when expert testimony is otherwise admissible, it may be excluded under Rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice. Fed. R. Evid. 403. The street value of illegal drugs, the distribution quantities, the modus operandi of drug traffickers and the structure of drug trafficking organizations are matters that are generally beyond the common knowledge of the average lay person. United States v. Valle, 72. F.3d 210, 215 (1st Cir. 1995). Thus, expert testimony in the form of an opinion regarding these subjects is likely to help a jury. Id. Whether such expert testimony will be admissible depends on the nature of the expert testimony.

The Ninth Circuit has drawn a distinction between expert testimony involving structure of drug trafficking organizations and drug courier profiles on the one hand, and expert testimony involving the modus operandi of drug traffickers or "unknowing couriers," on the other. With respect to expert testimony concerning the structure of drug trafficking organizations, the Court has held that such expert testimony is generally not relevant or admissible, except (1) when the defendant is charged with conspiracy or (2) when such evidence is otherwise probative of a matter properly before the trial court. See, e.g., United States v. Pineda-Torres, 287 F.3d 860, 863 (9th Cir. 2002); United States v. Vallejo, 237 F.3d 1008 (9th Cir. 2001), as amended 246 F.3d 1150 (9th Cir. 2001) (holding that expert testimony regarding structure of drug trafficking organizations was not relevant and was prejudicial where the defendant was not charged with a conspiracy to import and there was no evidence of defendant's connection to a drug trafficking organization). With regard to expert testimony about drug courier profiles, the Ninth Circuit has held that this is inherently prejudicial and, thus, generally not admissible. See United States v. Cordoba, 104 F.3d 225, 229-30 (9th Cir. 1997).

In contrast, "unknowing courier" expert testimony is admissible, even if a defendant's case is not complex or does not involve a conspiracy charge, as long as the "unknowing courier" expert testimony is relevant. Thus, in Murillo, where the defendant, who had been convicted for possession with intent to distribute cocaine, challenged on relevancy grounds the admission of "unknowing courier" expert testimony during trial, the court in affirming the admission of expert testimony, held that the "unknowing courier" testimony was relevant because it went to the heart of the defense that he did not know he was transporting drugs. Murillo, 225 F.3d at 1177.

Similarly, in Cordoba, the defendant, who was convicted of a non-conspiracy case of possession with intent to distribute cocaine, challenged on appeal the admission of "unknowing courier" expert testimony. Cordoba, 104 F.3d at 227, 229. In affirming the admission of such testimony, the Ninth Circuit held that "unknowing courier" expert testimony that drug traffickers do not entrust valuable cocaine to unknowing transporters was clearly probative of the defendant's knowledge that he possessed the drugs and that the testimony's probative value outweighed any prejudicial effect. Id. at 229. See also United States v. Castro, 972 F.2d 1107 (9th Cir. 1992) (holding that the jury could have reasonably found that the defendant knew he possessed marijuana where "experts testified that the amount of

cocaine, valued in the millions of dollars, would have never been entrusted to an unknowing dupe").

In the present case, the nature of the proposed testimony is precisely the type of testimony found to be relevant and admissible in Murillo and Cordoba. As in Murillo and Cordoba, Defendant was not charged with conspiracy and the unknowing courier expert testimony will go to the heart of the Defendant's expected defense that he did not know the marijuana was hidden in his vehicle and that it must have been placed there by persons known or unknown. Further, the expert testimony will help the jury's understanding of the evidence and aid its determination regarding facts at issue, namely, the Defendant's knowledge and intent, and is therefore relevant. See United States v. Sanchez-Lopez, 879 F.2d 541, 555 (9th Cir. 1989) (price, quantity and quality of drugs found relevant to intent to distribute drugs and no knowledge of their presence in the car).

Evidence about the drug-trafficking business, as well as admission of evidence about the modus operandi of drug couriers, is consistent with well-established law allowing as relevant to knowledge expert testimony about a criminal organization's modus operandi. See United States v. Alonso, 48 F.3d 1536, 1536 (9th Cir. 1995) (holding that law-enforcement officers may testify regarding "typical methods and techniques employed in an area of criminal activity," and explain how defendant's conduct conforms to typical methods); United States v. Gil, 58 F.3d 1414, 1421-22 (9th Cir. 1995) (admitting expert testimony regarding general practice of drug traffickers to establish defendants' modus operandi); United States v. Bosch, 951 F.2d 1546, 1549 (9th Cir. 1991) (holding that an agent with expertise in narcotics investigations may aid jury in understanding defendant's role in the charged offense); United States v. Jaramillo-Suarez, 950 F.2d 1378, 1384 (9th Cir. 1991) (holding that the expert properly testified regarding drug organization's use of pay-owe sheets to keep track of customers); United States v. Kinsey, 843 F.2d 383, 388 (9th Cir. 1988) (distinguishing testimony about a defendant's guilt or innocence from expert testimony regarding the various roles individuals may play in illegal enterprises); United States v. Guzman, 8439 F.2d 447 (9th Cir. 1988) (admitting expert agent's testimony that car switch is common maneuver used by narcotics traffickers); United States v. Patterson, 819 F.2d 1495, 1507 (9th Cir. 1987) (permitting expert testimony that members of narcotics rings play many different roles, including street salesmen, money collectors, and lookouts); United States v. Stewart, 770 F.2d 825, 831 (9th Cir. 1985); United States v. Maher, 645 F.2d 780, 783 (9th Cir. 1981) (per curium)

(allowing expert testimony that a defendant's actions were consistent with the modus operandi of persons transporting drugs).

The United States does not intend to introduce during its case-in-chief so-called profile and blind-mule testimony. See, e.g., Reid v. Georgia, 448 U.S. 438, 440 (1979) (defining "drug courier profile" evidence); United States v. Lui, 941 F.2d 844, 846 (1991). However, the United States reserves the right to introduce expert testimony about the modus operandi of drug-trafficking organizations, testimony about vehicle-registration procedures, blind-mule, and profile testimony if Defendant opens the door to any of those categories of evidence during opening statements, cross-examination, or Defendant's case-in-chief. See Vallejo, 237 F.3d at 1016; Alatorre, 222 F.3d at 1100 n.3 (structure and organizational testimony proper because Alatorre raised the fingerprints issue); United States v. Beltran-Rios, 878 F.2d 1208, 1212 (9th Cir. 1989) (drug-courier profile and "blind-mule" testimony admissible where defendant counsel opens door).

B. THE COURT SHOULD ADMIT DEMEANOR EVIDENCE

Evidence regarding a defendant's demeanor and physical appearance is admissible as circumstantial evidence that is relevant to the jury's determination as to whether a defendant knew contraband was concealed in the vehicle. See, e.g., United States v. Romero-Avila, 210 F.3d 1017, 1023 (9th Cir. 2000) (identifying defendant's nervousness at the border as part of the "strong independent evidence of defendant's guilt"); United States v. Hursh, 217 F3d. 761, 767-68 (9th Cir. 2000) (nervousness during border questioning at primary inspection and later nervousness while car was being inspected at secondary was evidence of knowledge); United States v. Klimavicius-Viloria, 144 F. 3d 1249, 1263-65 (9th Cir. 1998) (crew's demeanor, such as becoming less cooperative when the Coast Guard decided to search a tank where bales of cocaine were later found, was relevant to show knowing participation in smuggling); United States v. Fuentes-Cariaga, 209 F.3d 1140, 1144 (9th Cir. 2000) (defendant's nervousness at Calexico port of entry); United States v. Barbosa, 906 F.2d 1366, 1368 (9th Cir. 1990) (jury could infer guilty knowledge from a defendant's apparent nervousness and anxiety during airport inspection); United States v. Lui, 941 F.2d 844, 848 n.2 (9th Cir. 1991) (jury could consider guilty knowledge where defendant acted disinterested during airport inspection); United States v. Walitwarangkul, 808 F.2d 1352, 1354 (9th Cir. 1987) (affirming conviction for possession of

narcotics with intent to distribute where, inter alia, defendant "appeared nervous when questioned by customs"). Here, witnesses may properly testify as to their observations of Defendant's demeanor and physical appearance at the Calexico West Port of Entry.

C. THE COURT SHOULD LIMIT CHARACTER EVIDENCE

Defense counsel has requested that the United States facilitate the parole of Defendant's daughter into the United States in order that she may testify as a witness for the defense. The United States is unaware of any percipient information that Defendant's daughter may possess with respect to the charged offense. It would appear that Defendant's daughter will be called as a character witness.

To the extent that Defendant calls his daughter or any other witness to testify as to his character, the United States moves to exclude any testimony regarding any alleged specific acts of Defendant's prior good conduct. Testimony as to specific instances of good conduct violates Federal Rule of Evidence 405(a). United States v. Barry, 814 F.2d 1400, 1403 (9th Cir. 1987); Government of Virgin Islands v. Grant, 775 F.2d 508, 512 (3d Cir. 1985). Federal Rule of Evidence 404(a)(1) further states that evidence of a person's character is not admissible for the purpose of proving a person's actions on a particular occasion except "evidence of a pertinent trait of character offered by an accused or by the prosecution to rebut the same. . . ."

A character witness can not offer specific instances of conduct by the defendant which would tend to support the reputation of the defendant. United States v. Hedgecorth, 873 F.2d 1307, 1313 (9th Cir. 1989) ("[W]hile a defendant may show a characteristic for lawfulness through opinion or reputation testimony, evidence of specific acts is generally inadmissible"). In interpreting the permissible scope of character evidence under Rule 404(a), the Court of Appeals has held that presentation of witnesses to testify about a defendant's character for being law abiding and honest is permissible. But it is impermissible to elicit testimony from a defense witness regarding the defendant's propensity to engage in a specific type of criminal activity. See United States v. Diaz, 961 F.2d 1417 (9th Cir. 1992) (holding that it is impermissible under Rule 404(a) to ask a character witness about the defendant's propensity to engage in large scale drug dealing).

Thus, Defendant should be prohibited from introducing testimony from any character witness about (a) a specific instance of Defendant's conduct, and (b) Defendant's propensity to be involved in

drug smuggling.

D. THE COURT SHOULD PRECLUDE EVIDENCE OF DURESS AND NECESSITY

A pretrial motion is an appropriate means of testing the sufficiency of a proffered defense and precluding evidence thereof if the defense is found to be insufficient. Fed. R. Crim. P. 12(b) ("Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion."); United States v. Peltier, 693 F.2d 96, 97-98 (9th Cir. 1982) (per curiam); United States v. Shapiro, 669 F.2d 593, 596-97 (9th Cir. 1982); see also Fed. R. Crim. P. 12(e). Generally, motions are capable of pretrial determination if they raise issues of law, rather than issues of fact. United States v. Jones, 542 F.2d 661, 664 (6th Cir. 1976). Courts have specifically approved the pretrial exclusion of evidence relating to a legally insufficient duress defense on numerous occasions. See United States v. Bailey, 444 U.S. 394 (1980) (addressing duress); United States v. Moreno, 102 F.3d 994, 997 (9th Cir. 1996), cert. denied, 118 S. Ct. 86 (1997) (addressing duress). Similarly, a district court may preclude a necessity defense where"the evidence, as described in the defendant's offer of proof, is insufficient as a matter of law to support the proffered defense." United States v. Schoon, 971 F.2d 193, 195 (9th Cir. 1992).

In order to rely on a defense of duress, a defendant must establish a prima facie case that:

(1) Defendant committed the crime charged because of an immediate threat of death or serious bodily harm;

(2) Defendant had a well-grounded fear that the threat would be carried out; and

(3) There was no reasonable opportunity to escape the threatened harm.

United States v. Bailey, 444 U.S. 394, 410-11 (1980); Moreno, 102 F.3d at 997. If Defendant fails to make a threshold showing as to each and every element of the defense, defense counsel should not burden the jury with comments relating to such a defense. See, e.g., Bailey, 444 U.S. at 416.

A defendant must establish the existence of four elements to be entitled to a necessity defense:

(1) that he was faced with a choice of evils and chose the lesser evil;

(2) that he acted to prevent imminent harm;

(3) that he reasonably anticipated a causal relationship between his conduct and the harm to be avoided; and

(4) that there was no other legal alternatives to violating the law.

See Schoon, 971 F.2d at 195; United States v. Dorrell, 758 F.2d 427, 430-31 (9th Cir. 1985). A court may preclude invocation of the defense if "proof is deficient with regard to any of the four elements." See Schoon, 971 F.2d at 195.

The United States hereby moves for an evidentiary ruling precluding defense counsel from making any comments or eliciting testimony during opening statements, on cross-examination or in the defense the case-in-chief that relate to any purported defense of "duress" or "coercion" or "necessity" unless Defendant first makes a prima facie showing satisfying each and every element of such defense. The United States respectfully requests that the Court rule on this issue prior to opening statements to avoid the prejudice, confusion, and invitation for jury nullification that would result from such comments.

E. THE COURT SHOULD PROHIBIT REFERENCE TO DEFENDANT'S HEALTH, FINANCES, EDUCATION, AND POTENTIAL PUNISHMENT

Evidence of, and thus argument referring to, Defendant's health, age, finances, education and potential punishment is inadmissible and improper. "Evidence which is not relevant is not admissible." Fed. R. Evid. 402. Rule 403 provides further that even relevant evidence may be inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice." The Ninth Circuit Model Jury Instructions explicitly instruct jurors to "not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy." § 3.1 (2003).

Moreover, it is inappropriate for a jury to be informed of the consequences of their verdict. United States v. Frank, 956 F.2d 872, 879 (9th Cir. 1991). Any mention of penalty or felony status is irrelevant as it sheds no light on the Defendants' guilt or innocence. Therefore, the United States requests that the Court preclude any mention of possible punishment at any point in this trial.

F. THE COURT SHOULD EXCLUDE TESTIMONY OF DEFENDANT'S DAUGHTER

As noted above, defense counsel has requested that the United States parole Defendant's daughter into the United States from Mexico to testify as a defense witness. The United States does not believe that Defendant's daughter possesses relevant, percipient knowledge of the facts and circumstances of the charged offense. Defendant's daughter was not with him in the vehicle on May

11, 2008, and Defendant never indicated in his post-arrest statement that his daughter was with him when Defendant allegedly was solicited to drive the vehicle into the United States or otherwise has any percipient knowledge of his sojourn into the United States.

Should Defendant's daughter be allowed to testify as to matters concerning which she has no percipient knowledge, there is a serious likelihood of confusion and unfair prejudice to the United States. This is especially true given the potential emotional appeal of a close family member's testimony. In light of the reasonable likelihood that the testimony of Defendant's daughter would be both irrelevant and inadmissible, the United States requests that Defendant provide an offer of proof as to her anticipated testimony prior to requiring the United States to expend the substantial time and resources required to parole her into the United States for trial.

G. THE COURT SHOULD PROHIBIT SELF-SERVING HEARSAY

Defendant's may not introduce his own statements through the testimony of another witness, the opening statement of counsel, or argument by counsel. Any such attempt would be impermissible because those statements are hearsay. While the United States may use the statements of a defendant against him under Federal Rule of Evidence 801(d)(2) (admission by party-opponent), this Rule may not be relied upon by the Defendant because he is not the proponent of the evidence and the evidence is not being offered against him (but rather on his behalf). Defendant cannot attempt to have "self-serving hearsay" brought before the jury without the benefit of cross-examination by the United States. See e.g., United States v. Fernandez, 839 F.2d 639, 640 (9th Cir. 1987).

Nor may Defendant rely on Rule 801(d)(1)(B), which provides that a statement is not hearsay if:

> The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . . .

A prior consistent statement is not admissible if it is introduced in the absence of impeachment. See United States v. Navarro-Varelas, 541 F.2d 1331, 1334 (9th Cir. 1976) (appellant offered to introduce and play tape recording of interview of appellant and DEA agent to reinforce appellant's

credibility). Moreover, even if the declarant's testimony has been impeached, prior consistent statements are not admissible if the declarant had motive to give false information at the time that the prior out-of-court statement was made. See United States v. DeCoito, 764 F.2d 690, 694 (9th Cir. 1985) (declarant's prior consistent statement not admissible for purposes of rehabilitation if declarant had motive to lie to avoid prosecution when prior statement was made); United States v. Rohrer, 708 F.2d 429, 433 (9th Cir. 1983) (diagram drawn by declarant not admissible as prior consistent statement because declarant had motive when diagram was made to fabricate, that is, driving better leniency bargain with the government).

Finally, Defendant cannot rely on Rule 803(3), which provides that the hearsay rule does not exclude then existing mental, emotional, or physical condition. Addressing this issue in the context of a "derivative entrapment" defense, the Ninth Circuit affirmed the trial court's exclusion of testimony by a witness that the defendant had told the witness that the defendant was afraid of government agents. The court relied on the language emphasized above in Rule 803(3), holding that the rule did not except the witness's testimony from the hearsay rule. See United States v. Emmert, 829 F.2d 805, 809-10 (9th Cir. 1987).

Defendant cannot introduce his own statements through the testimony of another witness or by improper reference during opening statements. Rather, Defendant may provide a statement from the witness stand where he would properly be subject to cross-examination.

H. MOTION TO EXCLUDE WITNESSES

Under Federal Rule of Evidence 615(3), "a person whose presence is shown by a party to be essential to the presentation of the party's cause" should not be ordered excluded from the court during trial. The case agent in the present matter has been critical in moving the investigation forward to this point and is considered by the United States to be an integral part of the trial team. The United States requests that Defendant's testifying witnesses be excluded during trial pursuant to Rule 615.

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IV

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court grant the foregoing motions.

DATED: August 25, 2008.

Respectfully submitted,

Karen P. Hewitt
United States Attorney

s/ David D. Leshner
DAVID D. LESHNER
Assistant U.S. Attorney

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. BENJAMIN OCHOA-RAMIREZ, Defendant.	Case No. 08-CR-1637-WQH CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, DAVID D. LESHNER, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **UNITED STATES' NOTICE OF MOTIONS AND MOTIONS IN LIMINE** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Hanni Fakhoury, Esq.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 25, 2008.

/s/ David D. Leshner
DAVID D. LESHNER